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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Inventor: Eric Robinson
Serial No.: 09/416,675
Date Filed: October 12, 1999
For: AUTOMATIC BACKUP SYSTEM

Examiner: Uyen Le
Group Art Unit: 2171

Commissioner for Patents
BOARD OF PATENT APPEALS
AND INTERFERENCES
Washington, DC 20231

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Dated: October 2, 2002

Maureen Vieira
Maureen Vieira

APPEAL BRIEF

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1. REAL PARTY IN INTEREST.

CMS PERIPHERALS, INC., a California corporation, having a place of business at 3095 Redhill Avenue, Costa Mesa, California 92626.

CMS PERIPHERALS, INC. is the real party in interest by virtue of the assignment of the application recorded on February 1, 2000 (real/frame: 010570/0988) from the named inventor, Eric Robinson.

2. RELATED APPEALS AND INTERFERENCES.

There are no related appeals and interferences known to the applicant or the undersigned which will directly effect or be directly effected by or have a bearing on the Board's decision in the pending appeal.

3. STATUS OF CLAIMS.

Claims 1 through 20 have been cancelled without prejudice and Claims 21 through 40 have finally rejected.

4. STATUS OF AMENDMENTS.

The last amendment received in the U.S. Patent and Trademark Office on March 12, 2002, which was in response to the Final Office Action mailed on October 2, 2001, was not entered because it allegedly raised new issues that would require further consideration and/or search.

5. SUMMARY OF INVENTION.

Claims 21-40 are directed to an automatic backup system for a computer. The method comprises inserting an automatic backup system into the port of a computer, the computer scanning and detecting a device connected to the port, the computer identifying the automatic backup system, and the computer automatically launching a backup procedure to backup its files onto the automatic backup system, and the computer automatically closing down the backup procedure at the completion of the backup (page 9, lines 14-21). All page and line references herein are page and line references to the specification of the above patent application ("Patent Application").

With respect to Claim 21, the automatic backup system is an automatic backup device of an "ABS unit" which is a combination of a hard drive and a PCMCIA card. The ABS unit is connected to a PCMCIA port on the computer (page 4, lines 11-15). The computer scans for devices connected to its PCMCIA port and recognizes the ABS unit inserted into its PCMCIA port (page 4, lines 16-18). The computer then automatically launches its backup

procedure which comprises the computer scanning all files on its source drive and comparing the files on the ABS unit for date and time changes to identify changes, the computer comparing space available on the ABS unit and comparing it to the space required to backup file changes on the source drive in the computer (page 4, lines 19-24) and the computer then making a file-by-file transfer of all the file changes on the source drive to the ABS unit, if the computer finds enough space available on the ABS unit for the file changes (page 4, lines 25-26).

The following claims are directly dependent upon Claim 21 unless otherwise indicated.

Claim 22 includes the step wherein the computer reports the status of the backup at the end of the file transfer to the ABS unit (page 5, lines 5-6).

Claim 23 includes the additional step of the computer writing the status of the file transfer to the ABS unit at the end of the backup to the source drive on the computer (page 5, lines 8-10).

Claim 24 is dependent on Claim 23 and includes the additional step of the computer reviewing the status of the transfer at the end of the last backup when it scans all files on the source drive and compares the files on the ABS unit for the date and time changes (page 5, lines 12-14).

Claim 25 is dependent on Claim 23 and provides that the computer terminates the backup after completion of writing the status of the transfer (page 5, lines 16-17).

Claim 26 includes the step of offering the operator of the computer a manual option to launch backup prior to the computer scanning all the files on the source drive (page 5, lines 19-20).

Claim 27 is dependent upon Claim 26 and covers the option where the operator manually selects backup (page 5, lines 20-21).

Claim 28 specifies that the computer scans the registry for an automatic backup launch file when the computer recognizes the ABS unit connected to its PCMCIA port (page 5, lines 23-24).

Claim 29 covers the option where the computer requests a password after connection to the ABS unit to the PCMCIA port; the password is entered into the computer, the computer translates the backup procedure password from the registry and compares it to the entered password and the computer transfers passwords to the ABS unit wherein the unit compares password in its registry to the entered password, and upon the computer verifying the authenticity of the entered password, the computer launches the backup procedure, when the ABS unit authenticates the operator-entered password, it authorizes entry of the computer into the files (page 6, lines 1-10).

Claim 30 provides that the computer requests a password, a password is entered into the computer, the computer translates the password from its registry and the computer transfers the operator-entered password to the ABS unit (page 6, lines 12-14).

Claim 31 is an additional step where after the computer recognizes the ABS unit and requests a password from the ABS unit, the ABS unit furnishes a password to the computer, the computer translates the password from the registry, and the computer authenticates the password prior to launching the automatic backup procedure (page 6, lines 16-19).

Claim 32 covers the option wherein the computer requests the operator for a selection of options after the computer recognizes the ABS unit and before launching the backup procedure (page 6, lines 21-22).

Claim 33 covers the option where the computer scans its registry for option selections prior to launching the backup procedure (page 6, lines 23-24).

Claim 34 covers the option where the computer requests removal of the ABS unit from the port (page 7, lines 2-3).

Claim 35 is dependent upon Claim 34 and covers the step where the computer requests insertion of the ABS unit into the PCMCIA port (page 7, lines 5-7).

Claim 36 covers the step wherein the ABS unit is disconnected from the computer port prior to completion of the file transfer and the computer requests reconnection (page 7, lines 5-7).

Claim 37 covers the contingency wherein the computer after comparing the space available on the ABS unit finds there is insufficient space available to backup and monitors that there is insufficient available space in the ABS unit (page 7, lines 1-11).

Claim 38 is dependent upon Claim 37 and covers the contingency where the ABS unit is removed from the port and replaced with a new ABS unit having sufficient space available to backup the computer. Claim 38 is dependent upon Claim 37 (page 7, lines 9-14).

Claim 39 is dependent upon Claim 37 and covers the contingency where the computer shuts down the backup procedure when it finds there is insufficient space available on the ABS unit for the file changes (page 7, lines 9-14).

Claim 40 is an independent claim and covers the automatic backup method comprising the steps of inserting an automatic backup device into port of a computer, the computer scanning and detecting the automatic backup device, the computer identifying the automatic backup device, the computer automatically launching a backup procedure to backup its files onto the automatic backup device, and the computer automatically closing down the backup procedure at the completion of the backup (page 4, lines 2-10).

6. ISSUES.

Whether Claims 21-40 are unpatentable under 35 U.S.C. 103(a) over Makinen et al. (US 5,758,067) in view of Harari et al. (US 5,887,145).

7. GROUPING OF CLAIMS.

Claims 22-39 are dependent upon independent Claim 21. The remaining claim, Claim 40, is an independent claim.

The Claims 21 through 40 do not stand or fall together for the arguments set forth below in Section 8 entitled "Argument." Each of Claims 21 through 40 are patentably distinct because of the unique combination of steps in each claim. The combination of steps of Claims 21 through 40 are not taught, or suggested or motivated by the teaching of the references Makinen et al. and Harari et al. and thus are patentable over these two references under 35 U.S.C. 103(a).

8. ARGUMENT.

As stated above, all the claims, Claims 21-40, are rejected under 35 U.S.C. 103(a) as being unpatentable over the references Makinen et al. (US 5,758,067) and Harari et al. (US 5,887,145). The grounds for this rejection are set forth on pages 1-8 of the Final Office Action mailed on October 2, 2001 (the "Action" herein).

Claim 21. The Action states, "Makinen discloses a method of automatically backing up data from a computer (see the Abstract)" [page 4, lines 1-2 of the Action].

Makinen does not disclose a method of automatically backing up data. The Makinen abstract states, "A system and method for automatically archiving data from a

computer system to a backup system, the system provides a scheduler connected to an automatic backup mechanism for scheduling when backups are performed and incremental backups are performed.” Makinen requires a scheduler for backup.

MAKINEN et al.

Makinen et al. teaches that the scheduler is an essential part of its system.

Makinen et al. teaches: “A scheduler controls an automated backup mechanism. The scheduler uses system status information available from the computer system to determine, among other things, what type of backup is being performed” (see column 1, lines 50-54).

Makinen teaches: “Once the system has been enabled by the end user, no other action is required to ensure daily backups of all files on the system’s hard disk. A one-button paradigm has been selected to schedule the automatic backups, with full backups being performed at a predetermined day of the week, preferably Monday, and incremental backups being performed on every other day (see column 1, lines 55-62; see also column 2, lines 16-20; lines 45, 55; column 3, lines 7-10 and lines 21-29; and column 4, lines 37, 42). No where does Makinen disclose, teach, suggest a method or a backup system without a scheduler to schedule the date and time of backup.

The method according to Claim 21 commences backup, not upon a date and time schedule, but upon the computer recognizing ABS unit inserted into its PCMCIA port. Thus under Claim 21, a backup can commence at any hour of the day and any day of the week or month.

Makinen does not teach the combination of steps of Claim 21, and in particular does not suggest or teach: “Recognizing the ABS unit inserted into the PCMCIA port, launching the automatic backup procedure....”

HARARI et al.

Harari et al. is directed to an integral PC card formed by coupling a mother card portion and a daughter card portion. The integral PC card is removably coupled to the host system, a computer (column 3, lines 56-59). The main objective of Harari et al. is to provide a cost-effective memory system. This system is achieved by having each daughter card of the Harari et al. integral PC card containing only flash EPROM which acts essentially like a semiconductor flash EPROM floppy disk and need not have a controller on it. The one controller is on the mother card of the integral PC card which can serve any number of the flash EPROM floppy disks. Harari et al. also teaches that the system is quite flexible and that the user can add or decrease memory capacity by choosing among daughter cards with various amounts of installed memory chips, and with each upgrade of the controller, only the mother card need be replaced because the daughter card "floppy disk" being fully usable with the new mother card (column 4, lines 14-21). Harari discloses a number of embodiments for the partitioned integral PC card having the removably receivable daughter card. In one embodiment, the mother card portion can contain the common functional components of a number of peripherals, each peripheral having the rest of the functional components residing on a daughter card. Some of the hardware originally residing in the host system can be located to the mother card. The mother/daughter PC card can contain all the memory requirements of the host system. The mother card can be adapted to removably receive a plurality of daughter cards and the same controller on the mother card can control and service a number of daughter cards. The daughter card can be one of a mixture of peripherals, such as flash memory, modem and the like. Data encoding and decoding algorithm for recovering the data can be stored on the daughter card so that where ever the daughter card is inserted, it can carryout the function of decoding and coding. In another aspect of the invention, the removable daughter

card has identifying data that is readable by the mother card for the host system coupled thereto (see column 4, lines 22-25, 34-38, 52-55, 56-60, and 65-68; column 5, lines 1, 7-10, 28-36, and 37-40).

Harari et al. teaches that the host main memory can be relocated onto the mother card. This provides a single memory card which include a hybrid of main memory on the mother card and mass storage memory on the daughter card, all controlled by the controller of the mother card. The controller can move blocks of files into and out of memory on the daughter card and into and out of the main memory space on the mother card as well as do automatic backup of the main memory into the memory of the daughter card (column 9, lines 10-30). No where within the four corners of Harari et al. are the above recited steps and combination of steps of Claim 21 taught, suggested or motivated, and in particular Harari et al. fails to teach launching the automatic backup procedure upon recognition of the ABS unit inserted into the PCMCIA port or any other port for that matter.

The Law Regarding 103(a) Rejections

"('Obviousness is a legal conclusion based on underlying facts of four general types, all of which must be considered by the trier of fact: (1) the scope and content of the prior art; (2) the level of ordinary skill in the art; (3) the differences between the claimed invention and the prior art; and (4) any objective indicia of nonobviousness. See *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 [148 USPQ 459] (1966); *Continental Can Co. USA, Inc. v. Monsanto Co.*, 948 F.2d 1264, 1270, 20 USPQ2d 1746, 1750-51 (Fed. Cir. 1991); *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1566-68, 1 USPQ2d 1593, 1594 (Fed. Cir. 1987). 'Determination of obviousness cannot be based on the hindsight combination of components selectively culled from the prior art to fit the parameters of the patented invention.'" *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 546,

48 USPQ2d 1321, 1329(Fed. Cir. 1998). There must be a teaching or suggestion within the prior art, within the nature of the problem to be solved, or within the general knowledge of a person of ordinary skill in the field of the invention, to look to particular sources, to select particular elements, and to combine them as combined by the inventor. See *Ruiz v. A.B. Chance Co.*, 234 F.3d 654, 665, 57 USPQ2d 1161, 1167(Fed. Cir. 2000); *ATD Corp.*, 159 F.3d at 546, 48 USPQ2d at 1329; *Heidelberger Druckmaschinen AG v. Hantscho Commercial Prods., Inc.*, 21 F.3d 1068, 1072, 30 USPQ2d 1377, 1379(Fed. Cir. 1994) (“When the patented invention is made by combining known components to achieve a new system, the prior art must provide a suggestion or motivation to make such a combination.”).) *Crown Operations International Ltd. V. Solutia Inc.*, 62 USPQ2d 1917, 1921-22 (Fed. Cir. 2002)

“(The factual inquiry whether to combine references must be thorough and searching.” *Id.* It must be based on objective evidence of record. This precedent has been reinforced in myriad decisions, and cannot be dispensed with. See, e.g., *Brown & Williamson Tobacco Corp. v. Philip Morris Inc.*, 229 F.3d 1120, 1124-25, 56 USPQ2d 1456, 1459 (Fed. Cir. 2000) (“a showing of a suggestion, teaching, or motivation to combine the prior art references is an ‘essential component of an obviousness holding’”) (quoting *C.R. Bard, Inc., v. M3 Systems, Inc.*, 157 F.3d 1340, 1352, 48 USPQ2d 1225, 1232(Fed. Cir. 1998)); *In re Dembiczak*, 175 F.3d 994, 999, 50 USPQ2d 1614, 1617(Fed. Cir. 1999) (“Our case law makes clear that the best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references.”); *In re Dance*, 160 F.3d 1339, 1343, 48 USPQ2d 1635, 1637(Fed. Cir. 1998) (there must be some motivation, suggestion, or teaching of the desirability of making the specific combination that was made by the applicant); *In re Fine*, 837 F.2d 1071, 1075, 5

USPQ2d 1596, 1600(Fed. Cir. 1988) (“teachings of references can be combined only if there is some suggestion or incentive to do so.”) (emphasis in original) (quoting ACS Hosp. Sys., Inc. v. Montefiore Hosp., 732 F.2d 1572, 1577, 221 USPQ 929, 933(Fed. Cir. 1984)).

“(The need for specificity pervades this authority. See, e.g., In re Kotzab, 217 F.3d 1365, 1371, 55 USPQ2d 1313, 1317(Fed. Cir. 2000) (“particular findings must be made as to the reason the skilled artisan, with no knowledge of the claimed invention, would have selected these components for combination in the manner claimed”); In re Rouffet, 149 F.3d 1350, 1359, 47 USPQ2d 1453, 1459(Fed. Cir. 1998) (“even when the level of skill in the art is high, the Board must identify specifically the principle, known to one of ordinary skill, that suggests the claimed combination.

“(In other words, the Board must explain the reasons one of ordinary skill in the art would have been motivated to select the references and to combine them to render the claimed invention obvious.”); In re Fritch, 972 F.2d 1260, 1265, 23 USPQ2d 1780, 1783(Fed. Cir. 1992) (the examiner can satisfy the burden of showing obviousness of the combination “only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references”).” In re Lee 61 USPQ2d 1430, 1433-34 (Fed. Cir. 2002).

The quoted language from the above cases from the Federal Circuit Court of Appeals clearly requires a teaching or suggestion in the references for the combination and modifications which render the claimed invention obvious or explain why one ordinarily skilled in the art would have been motivated to make such combination.

8. Argument (continued).

The Examiner admits that Makinen et al does not specifically show that an automatic backup system is connected to the PCMCIA port of a computer. The Examiner argues that it is well known in the art, as shown by Harari et al., to connect peripheral cards to the PCMCIA port on the computer for backup purposes and refers to column 3, lines 20-23 and column 9, lines 18-30 of Harari et al. The Examiner concluded: "Therefore it would have been obvious to one of ordinary skill in the art to include connecting an ABS unit to the PCMCIA port while implementing the method taught by Makinen in order to use the standard port of the computer to attach peripheral cards for automatic backup of data as taught by Makinen et al." (page 4, lines 1-8 of the Action).

As stated above and repeated here, the combination of steps cited in the Action described above and the steps of launching the automatic backup procedure upon recognition of the ABS unit inserted into the PCMCIA port is not taught, suggested or motivated by either reference. This omission is never addressed in the Action. The above conclusionary statement: "Therefore, it would have been obvious to one of ordinary skill in the art to include connecting an ABS unit to the PCMCIA port..." does not provide evidence of a teaching or suggestion to combine the references and modify the references' teachings to yield Claim 21. The conclusionary statement does not address the issue of motivation to combine. The factual question of motivation is material to patentability, cannot be resolved in the subjective belief and unknown authority. It is improper in determining whether a person of ordinary skill would have been led to this combination of references, simply to use that which the inventor taught against its teacher. *In re Lee* 61 USPQ at 1434.

An essential element of the present invention is the seemingly simple step of having a backup commence automatically upon insertion of the ABS unit into the computer port. No operator intervention, except for this simple step of inserting the ABS unit in the port, is required.

Only in view of hindsight, namely in view of applicant's invention, would one of ordinary skill in the art combine the references and pick and choose and create steps to achieve the result of Claim 21. There is no teaching, there is no suggestion, there is no motivation for combining the references in order that the combination reads on Claim 21. Thus, to achieve the Claim 21 by combining the two cited references, the teaching of the references must be modified. "Even when obviousness is based on a prior art reference, there must be a showing of a suggestion and motivation to modify the teachings of the reference. See *B.F. Goodrich Co. v. Aircraft Breaking Sys. Corp.*, 72 F.3d 1577, 1582, 37 USPQ2d 1314, 1318 (Fed. Cir. 1996).

The Claim 21 Lines 4 and 5 of Claim 21 provide: "The computer recognizing the ABS unit inserted into the PCMCIA port; the computer launching its automatic backup procedure."

With regard to Claim 21, the Action continues: "Furthermore, it would have been obvious to one with ordinary skill in the art to include all the claimed operations of scanning for devices connected to the PCMCIA port, **recognizing the ABS unit inserted into the PCMCIA port, launching the automatic backup procedure**, scanning all source files and comparing to the files on the ABS for changes, determining space required for backing up data and space available on ABS, making a file-by-file transfer of the changes to the ABS unit if space is available in the ABS since the computer has to recognize the presence of the ABS before

launching the automatic backup and only files that have been changed need [be] backed up again on the ABS, provided space is available on the ABS." (page 4, lines 9-18 of the Action)

As stated above, the two references do not teach or suggest or provide motivation for the above combination of steps, and in particular, the highlighted combinations of steps.

Claim 22. The Action states: "Regarding Claim 22, official notice is taken that it is well-known in the art for a computer to report the status of an operation. Therefore, it would have been obvious to one of ordinary skill in the art to make the computer report status backup at the end of the file-by-file transfer to the ABS in order to allow users to verify the status of the files being backed up." The Examiner has cited no prior art teaching or suggestion to support this allegation. A conclusionary allegation that it is obvious to one of ordinary skill in the art without evidence of a teaching or suggestion, is not proper grounds for rejecting a claim.

("Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or suggestion supporting the combination. Under section 103, teachings of references can be combined only if there is some suggestion or incentive to do so." 13 Although couched in terms of combining teachings found in the prior art, the same inquiry must be carried out in the context of a purported obvious "modification" of the prior art. The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification.)" *In re Fritch*, 23 USPQ2d at 1783-84.

Here, the Examiner relied upon hindsight to arrive at the determination of obviousness. It is impermissible to use the claimed invention as an instruction manual or

"template" to piece together the teachings of the prior art so that the claimed invention is rendered obvious. 15 This court has previously stated that " [o]ne cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention." In *re Fritch*, 23 USPQ2d 1780, 1784 (Fed. Cir. 1992).

Claim 22 is independently patentable because it includes an additional step not taught, suggested or motivated by the references.

Claims 23 and 24. Claim 23 specifies that the computer writes the status of the file transfer to the ABS unit at the end of the backup to the source drive. Claim 24 recites that the computer reviews the status of the file transfer at the end of the last backup when it scan all files on the source drives and compares the files on the ABS units for date and time changes. The Action admits that Makinen does not specifically show that the computer writes the status of the file transfer to the ABS unit at the end of the backup to the source drive and does not review the status of the file transfer when it scans all the files on the source drives and compares the files on the ABS unit for data and time changes. However, the Action states, "It would have been obvious to one with ordinary skill in the art to do so in order to keep track of which files had been last backed up at the ABS unit."

Neither Makinen or Harari teach or even suggest steps of Claims 23 and 24.

Again the Examiner has found it obvious to one of ordinary skill in the art to carryout the steps of Claim 23 and 24 but fails to show such steps are taught in the prior art let alone suggested or that motivation exists to combine and modify such references to yield the steps of the claims. In view of hindsight can one do a hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. Hindsight is not a proper basis for a 103(a) rejection. See *In re Fritch* at 23 USPQ2d, 1784.

Claims 23 and 24 are independently patentable because each claim includes an additional step not taught, suggested or motivated by the references.

Claim 25. Claim 25 specifies that the computer terminates the backup after completion of writing the status of the file transfer to the ABS unit at the completion of the backup.

The Action states: "...It would have obvious to one of ordinary skill in the art to make the computer terminate the backup after completion of writing the status of the file-by-file transfer to the ABS unit in order to complete the operation of backup and turn off the ABS unit." The claim does not recite "turning off the ABS unit."

The Examiner's statement is not supported by evidence of a teaching, suggestion or motivation. Neither Makinen or Harari teach or even suggest the steps of Claim 25, and do not motivate to make the combination and modification to yield Claims 25.

Claim 25 is independently patentable because it includes an additional step not taught by the references.

Claim 26. Claim 26 specifies that the computer offers an operator of the computer a manual option to launch backup prior to the computer scanning all files on the source drive.

The Action states: "...It would have been obvious to one of ordinary skill in the art to make the computer offer an operator a manual option to launch backup prior to the computer scanning all files on the source drive in order to allow the operator to control the operation of backup for specific files."

The claim does not include the limitation "to all the operator to control the operation of backup for specific files." The method of Claim 26 provides the computer offers an operator a manual option to launch backup prior to the computer scanning of all files on the source drive. The two operations are not connected. We are talking about apples and oranges. For purposes of this appeal, the essential issue is whether there is a teaching or some suggestion or motivation to combine and modify the prior art to yield Claim 26. The Examiner has failed to show where at least one of the references make such a teaching, suggestion or motivation. Only in view of hindsight can one do a hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. This is not a proper basis for a 103(a) rejection. See *In re Fritch* at 23 USPQ2d 1784.

Claim 26 is independently patentable because it includes an additional step not taught, suggested or motivated by the references.

Claim 27. Claim 27 is dependent upon Claim 26 and recites that the operator manually selects backup and the computer automatically commences the backup procedure. Claim 27.

The Examiner alleges it would have been obvious to one of ordinary skill in the art to make the computer automatically commence backup procedure once the operator manually selects backup in order to automatically backup the files selected by the operator.

As stated above, Claim 27 is dependent upon Claim 26 which provides computer operator a manual option to launch backup prior to the computer scanning all files on the source drive. Claim 27 covers the option where the operator manually selects backup and the computer automatically commences the backup procedure. Both these claims ultimately are

dependent upon Claim 21 which provides that when the computer recognizes the ABS unit inserted into the port, the computer launches its automatic backup procedure.

The Examiner has not shown where in the references the Claim 27 combination of steps is taught or suggested. The Examiner has provided no evidence to show motivation for one ordinarily skilled in the art to combine the references to yield Claim 27. Only in view of hindsight would one do a hindsight reconstruction of the two references to pick and choose and modify the references to yield Claim 27. Hindsight reconstruction is not a proper basis for 103(a) rejection. See *In re Fritch* at 23 USPQ2d at 1784.

Claim 27 is independently patentable because it includes an additional step not taught, suggested or motivated by the references.

Claim 28. Claim 28 provides a step whereby the computer scans its registry for an automatic backup launch file when the computer recognizes the ABS unit connected to its PCMCIA port.

The Action states: "...Makinen teaches an automatic backup system but fails to specifically show that the computer scans its registry for automatic backup launch file when the computer recognizes the ABS unit connected to its PCMCIA port. However, it is well-known in the art as shown by Harari to connect peripherals to the PCMCIA port of a computer to backup data as discussed in Claim 1. Therefore, it would have been obvious to one with ordinary skill in the art to include scanning the computer registry for an automatic backup launch file upon recognition of the presence of the ABS unit in order to automatically launch the backup operation with operator intervention."

The Examiner admits that Makinen fails to teach that the computer scans its registry for an automatic backup launch file. Harari also fails to teach this step. Applicant is at

a loss to explain how the step of Claim 28 is obvious to one ordinarily skilled in the art since neither reference teaches or suggests or provides motivation for the combination and restructuring of the references to yield Claim 28. Only in view of hindsight would one do a hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. Hindsight is not a proper basis for a 103(a) rejection. See *In re Fritch* at 23 USPQ2d 1784.

Claim 28 is independently patentable because it includes additional steps not taught, suggested or motivated by the references.

Claim 29. Claim 29 includes the additional step of the computer requesting a password after connection of the ABS unit to the computer's port. A password is entered into the computer, the computer translates the backup procedure password from the registry and compares it to the entered password, and the computer transfers the passwords to the ABS unit wherein the unit compares the password in its registry to the entered password, and upon the computer verifying the authenticity of the entered password, the computer launches the automatic backup procedure.

The Action states regarding Claim 29 that: "...Since a password identifies who can access data, it would be have been obvious to one with ordinary skill in the art to make the computer request a password after connection of the ABS unit to the computer and to include all the claimed operations in order to prevent unauthorized operators to access and copy data from the computer of the ABS unit.

The use of passwords to enter computers are known. However, the combination and sequence of steps set forth in Claim 29 are new. The computer requests a password after connection to the ABS unit. The password is entered in the computer. The computer

translates the backup procedure password from the registry and compares it to the entered password. Then the computer transfers passwords to the ABS unit wherein the ABS unit compares the password in its registry to the entered password. Then the computer, verifying the authenticity of the entered password, launches a backup procedure and the ABS unit in turn authenticates the operator-entered password, and then authorizes entry of the computer into its files. This combination is not taught or even suggested or motivated by the two prior art references. The Examiner's conclusion of it being obvious to one of ordinary skill in the art to carryout the steps of Claim 29 is not supported by evidence in the references. Only in view of hindsight would one do a hindsight reconstruction of the references to yield Claim 29. Hindsight is not a proper basis for a 103(a) rejection. See *In re Fritch* at 23 USPQ2d 1784.

Claim 29 is independently patentable because it includes an additional step not taught, suggested or motivated by the references.

Claim 30. Claim 30 includes the additional step of the computer requesting a password, the password is entered into the computer, the computer translates the password from the registry, and the computer transfers the operator-entered password to the ABS unit.

With regard to Claim 30, the Action states: "...Since a correct password is needed for the ABS unit to operate, it would have been obvious to one with ordinary skill in the art to make the computer request a password, translate the password from its registry, transfer the password to the ABS unit connected to its PCMCIA port in order authenticate users.

Harari et al. teaches that the daughter card can have identifying data that is readable by the mother card or the host system. The identifying data includes information and identifies what type of peripheral device is implemented on the daughter card. In an other embodiment, the identifying data includes an identifying code assignable to the daughter card

for operational expediency and security applications (column 5, lines 37-52; column 13, lines 47-67; column 14, lines 1-30).

There is no teaching in either of the cited references teaching, suggesting that rather than having the computer authenticate the password, that the ABS unit connected to the computer authenticates users as set forth in Claim 30. The Examiner has not presented evidence from the references showing that a combination and reconstruction of the references to yield the steps of Claim 30 is taught, suggested or motivated. Only in view of hindsight would one reconstruct the reference to yield Claim 30. Hindsight reconstruction is not a proper basis for a 103(a) rejection. See *In re Fritch* at 23 USPQ2d 1784.

Claim 30 is independently patentable over because it includes an additional step not taught, suggested or motivated by the references.

Claim 32. Claim 32 includes the step of the computer requesting an operator for a selection of options after the computer recognizes the ABS unit connected to the PCMCIA port before launching a backup procedure.

With regard to Claim 32, the Action states, "It would have been obvious to one of ordinary skill in the art to include requesting the operator for a selection of options after the computer recognizes the ABS unit connected to its PCMCIA port and before launching the backup procedure in order to get more flexibility to the operators who desire specific features. Neither of the cited references suggest or teach this step. There is no evidence showing motivation to combine and modify to yield Claim 32. Only in hindsight can the references be combined and reconstructed to furnish this step. Hindsight reconstruction is not a proper basis for a 103(a) rejection. See *In re Fritch* at 23 USPQ2d 1784.

Claim 32 is independently patentable because it includes an additional step not taught, suggested or motivated by the references.

Claim 33. Claim 33 includes the step whereby the computer scans its registry for option selections prior to launching the backup procedure.

With regard to Claim 33, the Action states: "Claim 33 merely reads on the fact that any application has to operate according to its configuration. Therefore, it would have been obvious to one of ordinary skill in the art to make the computer scan its registry for options selections prior to launching the backup procedure in order for the operation to perform according to the desired options set up by the operator." This step of Claim 33 is not taught by either of the cited references. The Examiner's statement does not show where the references teach, suggest or motivate the combination and modification of the references. To yield Claim 33 from the references, hindsight reconstruction of the references is required. Hindsight reconstruction is an improper basis for rejecting the patentability of a claim under 103(a). See *In re Fritch* at 23 USPQ2d at 1784.

Claim 33 is independently patentable because it includes an additional step not taught, suggested or motivated by the references.

Claim 34. Claim 34 includes the step of the computer requesting removal of the ABS unit from its PCMCIA port.

With regard to Claim 34, the Action states: "Since the backup system is external to the computer as shown by Harari, it would have been obvious to one of ordinary skill in the art to make the computer request removal of the ABS unit from its PCMCIA port once the operation is completed in order to disconnect the ABS unit from the computer." The claim does

not limit the step to "once the operation is complete." The step of Claim 34 is not taught or suggested by the two cited references. The Examiner has failed to show within either of the two references a teaching, suggestion, or even a motivation for combining the references and restructuring to the references to yield the step of Claim 34. Only with hindsight reconstruction can the two references be modified to yield the step of Claim 34. Hindsight reconstruction is not a proper basis for rejecting a claim under 103(a). See *In re Fritch* at 23 USPQ2d at 1784.

Claim 34 is independently patentable because it includes an additional step not taught, suggested or motivated by the references.

Claim 35. Claim 35 which is dependent upon Claim 34 includes the step of the computer requesting insertion of the ABS unit into its PCMCIA port.

With regard to Claim 35, the Action states, "It would have been obvious to one of ordinary skill in the art to make a computer request insertion of the ABS unit to the computer port in order to perform the backup operation." Claim 35 is dependent upon Claim 34 which is dependent upon Claim 21. Claim 34 includes the step where the computer requests removal of the ABS unit from its port and Claim 35 includes the following step of the computer requesting insertion of the ABS unit into the port. Neither of these steps are taught by the references. The Examiner has failed to show where in the references the step of Claim 35 and/or Claim 34 is taught, suggested or even motivated. Only in view of hindsight reconstruction would one ordinarily skilled in the art combine and modify the two references to yield the step of Claim 35. Hindsight reconstruction is not a proper basis for 103(a) rejection of a claim. See *In re Fritch* at 23 USPQ2d at 1784.

Claim 35 is independently patentable because it includes an additional step not taught, suggested or motivated by the references.

Claim 36. Claim 36 covers the contingency where the ABS unit is disconnected from the computer's PCMCIA port prior to completion of the file-by-file transfer; and the computer requests connection of the ABS unit to its PCMCIA port.

With regard to Claim 36, the Action states: "Claim 36 merely reads on the fact that the computer detects the absence of the ABS unit during the backup operation and requests reconnection, it would have been obvious to one of ordinary skill in the art to include the claimed operation in order to complete an ongoing backup process." This step is not taught by the two cited prior art references. The Examiner has failed to show where in the references the combination and reconstruction of the references is taught, suggested or motivated to yield the step of Claim 36. Only in view of hindsight reconstruction could the two references be modified to yield the step of Claim 36. Hindsight reconstruction is not a proper basis for rejecting the patentability of a claim under 103(a). See *In re Fritch* at 23 USPQ2d at 1784.

Claim 36 is independently patentable because it includes an additional step not taught, suggested or motivated by the references.

Claim 37. Claim 37 includes the additional step where the computer compares the space available in the ABS unit to the file changes in the source drive and finds there is insufficient space available to backup the files changes and monitors there is insufficient available space in ABS unit to complete the backup procedure.

Claim 38. Claim 38 is dependent upon Claim 37. Claim includes the additional step where the ABS unit is removed from the PCMCIA port and replaced with a new ABS unit having sufficient space available to backup the computer source drive.

With regard to Claims 37 and 38, the Action states: "Claims 37, 38 merely read on the fact that enough space should be detected prior to launching a backup operation. Therefore, it would have been obvious to one of ordinary skill in the art to make the computer compare the space available in the ABS unit to the file changes and replace the ABS unit which has insufficient space with one having enough space to backup the source drive in order to avoid wasting time on an incomplete operation due to insufficient space on the ABS unit.

Again, the steps of these two claims are not taught or suggested by the two cited prior art references. The Examiner has failed to show in either reference a teaching or suggestion or motivation to combine the references and restructure their teaching to yield the steps of Claims 37 and 38. Only hindsight reconstruction of the two references can yield the steps of Claims 37 and 38. As stated a number of times in this Brief, hindsight reconstruction is not a proper basis for rejecting the patentability of claims under 103(a).

Claims 37 and 38 are independently patentable because each of the claims has additional steps which are not taught, suggested or motivated by the references.

Claim 39. Claim 39 which is dependent upon Claim 37 provides that the computer shuts down the backup procedure when it finds there insufficient space available on the ABS unit for the file changes.

With regard to Claim 39, the Examiner states: "Since enough space is necessary to backup changed data, it would have been obvious to one with ordinary skill in the art to make the computer shut down the backup procedure when it finds there is insufficient

available space to complete the backup procedure in order to avoid wasting time on an incomplete backup due to its insufficient space.”

Claim 39 is not taught or suggested by the two references. The Examiner has failed to show that where in the references it is suggested, taught, or motivated to combine the references and reconstruct them to yield the steps of Claim 39. It would require hindsight reconstruction of the two references by one ordinarily skilled in the art to achieve the steps of Claim 39. As reiterated numerous times in this Brief, hindsight reconstruction is not a proper basis for a 103(a) rejection.

Claim 39 is independently patentable because it contains additional steps which are not taught, suggested or motivated by the references.

Claim 40. Claim 40 is directed to an automatic backup method comprising the steps of inserting automatic backup device into a port of a computer, the computer scanning and detecting the automatic backup device, the computer identifying the backup device, the computer automatically launching a backup procedure to backup its files onto the device, and the compute automatically closing down a backup procedure at the completion of the backup. These claims preclude human intervention or scheduling.

The Office Action with regard to Claim 40 states: “Makinen discloses an automatic backup system” (see the abstract).

As stated above, Makinen discloses in its abstract and throughout its specification an automatic backup system that requires a scheduler that schedules the time for the automatic backup. When the scheduled date and time are reached, the Makinen system backups. But if that date and time is not reached, there is no automatic backup. Thus, under

the Makinen system, even if one inserted an ABS unit into the computer port, the automatic backup would not commence unless the scheduled date and time was met.

The Action continues: "Although Makinen does not specifically show that the system performs all the claimed operations [Claim 40], it is well-known in the art to connect a backup system to a computer as shown by Harari (see column 3, lines 20-23, column 9, lines 18-30). Therefore, it would have been obvious to one with ordinary skill in the art to include all **the claimed operations of scanning and detecting a device connected to the port of a computer, identifying the automatic backup system, automatically launching a backup procedure** while implementing the system of Makinen in order to backup file changes to a system connected to the computer through a port depending upon the size of the backup data as taught by Harari to avoid operator intervention. Furthermore, since the backup system is inserted to a port of the computer, it would have been obvious to one with ordinary skill in the art to make the computer automatically close the backup procedure once the backup has been completed in order to disconnect the backup system from the computer system."

Not only does Makinen not specifically show that the system performs all the claimed operations, but Harari does not specifically show that the system performs all the claimed operations. Neither reference teaches or suggests automatically launching a backup procedure without human intervention. There is no teaching or suggestion in either reference to include the operations of scanning and detecting a device connected to a port of the computer, identifying the automatic backup system, and automatically launching a backup procedure. Automatically launching a backup procedure while implementing the system of Makinen in order to backup file changes to a system connected to the computer through a port depending on the size of the backup data as taught by Harari to avoid operator intervention does not yield the claimed invention. The Makinen system is implemented with a scheduler. Harari has no

teaching or suggestion regarding backup without operator intervention. It would require hindsight reconstruction of the two references by one ordinarily skilled in the art to achieve the steps of Claim 40. As reiterated numerous times in this Brief, hindsight reconstruction of references is not a proper basis for rejecting patentability of a claim. See *In re Fritch* at 23 USPQ2d at 1784 and the other cases cited under the heading "The Law Regarding 103(a) Rejections" supra.

The Examiner has failed to show anywhere within the two references teaching, suggestion, or motivation to have a backup carried out without scheduling or without operator intervention.

Claim 40 is independently patentable because the combination of steps are new and are not taught suggested or motivated by the references.

With regard to grouping of the claims, each of the claims has a combination of steps which are unique to itself that are not taught in the other claims. Thus, each claim is distinguishable over all the other claims. In addition, for the reasons set forth in the argument above, each of the claims is patentable over the two references because the two references do not teach, suggest or motivate one to combine the references and modify the combination to yield Claims 21-40.

The proposed revised drawing was filed in the application. The Examiner required revision of the drawing. The applicant and undersigned to not know what is wanted in the drawing. A proposed drawing was submitted for approval and not approved. The undersigned attempted to set up an interview with the Examiner regarding the final rejection and the drawing. No such interview could ever be scheduled with Examiner although the

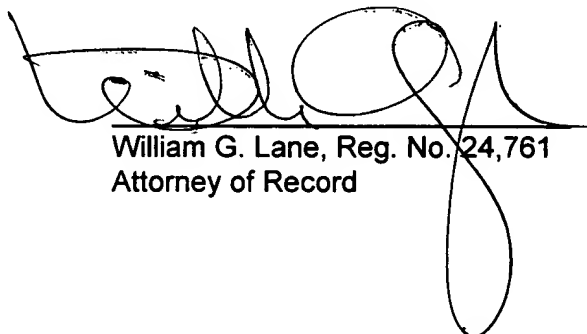
undersigned tried. The applicant and the undersigned were willing to come to the Patent Office from the West Coast to interview this case, the rejection and the drawing changes.

The undersigned submits that the amended claims set forth in the amendment after final placed the case in condition for allowance. Applicant does not know why the amended claims filed after the Final Action raised new issues that would require further consideration and/or search. The proposed amended claims were not entered into the amendment after final. The undersigned submits that the issues in this case would seem to be amenable by an interview between the Examiner and the undersigned.

Applicant requests that the rejection of Claim 21-40 be reversed and found allowable and the application remanded to the Examiner to handle the drawing requirement.

Respectfully submitted,

Date: October 2, 2002



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Attorney of Record

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9. APPENDIX. (claims from 8/13/01 amdt)

IN THE CLAIMS

Cancel Claims 1-20 without prejudice and substitute and replace with Claims 21-40.

21. A method of automatically backing up data from a computer comprising:
connecting an ABS unit designated as a data backup to a PCMCIA port on a computer;
the computer scanning for devices connected to its PCMCIA port;
the computer recognizing the ABS unit inserted into its PCMCIA port;
the computer launching its automatic backup procedure;
the computer scanning all files on its source drives and comparing the files on the ABS
unit for date and time changes to identify file changes;
the computer comparing space available on the ABS unit and comparing it to the space
required to back up file changes on the source drive in the computer; and
the computer making a file-by-file transfer of the file changes on the source drive to the
ABS unit, if the computer finds enough space available on the ABS unit for the file changes.

22. The method according to Claim 21 wherein the computer reports status
of backup at the end of the file-by-file transfer to the ABS unit.

23. The method according to Claim 21 wherein the computer writes the
status of the file-by-file transfer to the ABS unit at the end of backup to the source drives.

24. The method according to Claim 23 wherein the computer reviews the status of the file-by-file transfer at the end of the last backup when it scans all files on the source drives and compares the files on the ABS unit for date and time changes.

25. The method according to Claim 23 wherein the computer terminates the backup after completion of writing the status of the file-by-file transfer to the ABS unit at the completion of the backup.

26. The method according to Claim 21 wherein the computer offers an operator of the computer a manual option to launch backup prior to the computer scanning all files on the source drive.

27. The method according to Claim 26 wherein the operator manually selects backup and the computer automatically commences the backup procedure.

28. The method according to Claim 21 wherein the computer scans its registry for an automatic backup launch file when the computer recognizes the ABS unit connected to its PCMCIA port.

29. The method according to Claim 21 wherein the computer requests a password after connection of the ABS unit to the computer's PCMCIA port; a password is entered into the computer, the computer translates the backup procedure password from the registry and compares it to the entered password and the computer transfers passwords to the ABS unit connected to its PCMCIA port wherein the ABS unit compares password in its registry

to the entered password; and upon the computer verifying the authenticity of the entered password, the computer to launches the backup procedure, and when the ABS unit authenticates the operator-entered password authorizes entry of the computer into its files.

30. The method according to Claim 21 wherein the computer requests a password; a password is entered into the computer; the computer translates the password from its registry; and the computer transfers the operator-entered password to the ABS unit connected to its PCMCIA port.

31. The method according to Claim 21 wherein the computer after recognizing the ABS unit connected to its PCMCIA port and requests a password from the ABS unit; the ABS unit furnishes the password to the computer; the computer translates the password from the registry; and the computer authenticates the password prior to launching the automatic backup procedure.

32. The method according to Claim 21 wherein the computer requests the operator for a selection of options after the computer recognizes the ABS unit connected to its PCMCIA port and before launching the backup procedure.

33. The method according to Claim 21 wherein the computer scans its registry for option selections prior to launching the backup procedure.

34. The method according to Claim 21 wherein the computer requests removal of the ABS unit from its PCMCIA port.

35. The method according to Claim 34 wherein the computer requests insertion of the ABS unit to its PCMCIA port.

36. The method according to Claim 21 wherein the ABS unit is disconnected from the computer PCMCIA port prior to completion of the file-by-file transfer; and the computer requests connection of the ABS unit to its PCMCIA port.

37. The method according to Claim 21 wherein the computer compares the space available on the ABS unit to the file changes on the source drives and finds there is insufficient space available to backup the file changes and monitors that there insufficient available space on the ABS unit to complete the backup procedure.

38. The method according to Claim 37 wherein the ABS unit is removed from the PCMCIA port, and replaced with a new ABS unit having sufficient available space to backup the computer source drive.

39. The method according to Claim 37 wherein the computer shuts down the backup procedure when it finds there is insufficient available space available on the ABS unit for the file changes.

40. An automatic backup method comprising the steps of:
inserting an automatic back up device into a port of a computer;

the computer scanning and detecting the automatic backup device connected to the
port;

the computer identifying the automatic backup device;

the computer automatically launching a backup procedure to backup its files onto the
automatic backup device; and

the computer automatically closing down the backup procedure at the completion of the
backup of the computer files onto the automatic backup device.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Inventor: Eric Robinson
Serial No.: 09/416,675
Date Filed: October 12, 1999
For: AUTOMATIC BACKUP SYSTEM

Examiner: Uyen Le

Group Art Unit: 2171

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Dated: October 2, 2002


Maureen Vieira

REQUEST FOR FOURTH-MONTH EXTENSION OF TIME TO FILE APPEAL BRIEF

Sir:

Applicant requests an additional one-month extension of time to file an appeal brief, until October 2, 2002, for a total of four months. The fee of \$260 is enclosed herewith for the fourth-month extension fee. The three-month extension fee of \$460 was previously paid. A copy of the previous request is attached hereto. The total fee paid for the four months extension is \$720. Applicant qualifies as a small entity.

Respectfully submitted,

Date: October 2, 2002


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Client: CMS PERIPHERALS, INC.
Inventor(s): ERIC ROBINSON
Title: AUTOMATIC BACKUP SYSTEM

Atty Dkt No.: C013-1002
Serial No.: 09/416,675
Date Filed: October 12, 1999

The Assistant Commissioner for Patents acknowledges receipt of the following listed items on the date stamped hereon:

Request for Extension of Time to File Appeal Brief (O+2)
Check No. 4704 in amt of \$460 for 3-mo EOT

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Eric Robinson
Serial No.: 09/416,675
Date Filed: October 12, 1999
For: AUTOMATIC BACKUP SYSTEM

Examiner: Uyen Le
Group Art Unit: 2171

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Assistant Commissioner for Patents
Washington, DC 20231

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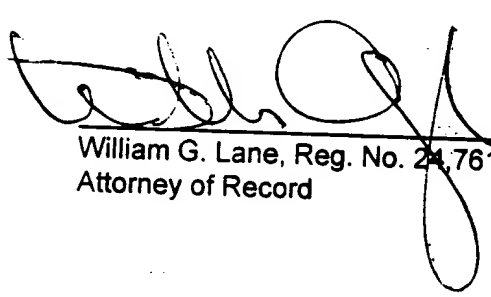
Applicant requests a three-month extension of time to file an appeal brief, until September 2, 2002.

The three-month extension fee of \$460 is enclosed herewith. Applicant qualifies as a small entity.

Respectfully submitted,

Date:

Aug 14, 2002


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